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FILED

No. 95-167

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS S. WALDRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in petitioner's prosecution under 18 U.S.C. 1014 for making false representations to a bank, the absence of an instruction requiring the jury to determine that those false representations were material was plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 53 F.3d 680.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1995. The petition for a writ of certiorari was filed on July 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Louisiana, petitioner was convicted on six counts of making false state-

ments for the purpose of influencing the lending actions of a federally insured bank, in violation of 18 U.S.C. 1014. He was sentenced to a term of 36 months' imprisonment, to be followed by five years' probation. He was also fined a total of $2 million. The court of appeals affirmed. Pet. App. 1a-7a.

1. In 1981, petitioner, a real estate developer, purchased a parcel of Florida real estate for $1,850,000 through his corporation, Marpalm Ranch and Farm, Inc. (Marpalm). Petitioner later began to experience financial problems, and invited two associates, Larry Reger and Harry Williams, to buy into the development venture and assume the mortgage payments on the property. In 1982, petitioner, in exchange for certain payments, entered into a contract to sell the property to Reger and Williams, with an arrangement for a closing in escrow. Petitioner also executed two unrecorded warranty deeds for the property which were held by a trustee for Reger and Williams. The 1982 contract disclosed four pending disputes over environmental issues affecting the property. Pet. App. 1a-2a.

In 1985, petitioner, through three nominee corporations, obtained three loans on the Marpalm property from the Sun Belt Federal Bank (Sun Belt) in the amount of $1 million each. Petitioner did not disclose to the nominee corporations or to Sun Belt the existence of the 1982 contract for the sale of the property, the two warranty deeds, or the pending environmental proceedings. As a result, each nominee, at petitioner's direction, incorrectly represented to Sun Belt in loan agreements and affidavits that no litigation or governmental proceeding was pending or threatened against the land, and that the land was not subject to any encumbrance other than the mortgage

to Sun Belt. After the trustee for Reger and Williams learned of the Sun Belt loans to petitioner on the Marpalm property, he filed one of the previously unrecorded warranty deeds. Pet. App. 2a-4a.

2. Following a jury trial, petitioner was convicted on six counts of making false statements for the purpose of influencing the lending actions of Sun Belt, in violation of 18 U.S.C. 1014. Those counts arose from petitioner's failure to disclose the 1982 contract for sale, the warranty deeds, and the environmental proceedings affecting the property. In its instructions, the district court advised the jury that the materiality of the alleged false representations was a question of law for the court, and that the court had determined that the statements at issue in the Section 1014 counts were material. 10/25/93 Tr. 263. Petitioner agreed that materiality was a determination for the court, and had requested that the district court not only not submit the issue of materiality to the jury, but that the jury not be told that the court had found petitioner's representations material.[1]

3. The court of appeals affirmed. Pet. App. 1a-7a. It rejected petitioner's challenges to the sufficiency of the evidence and to several evidentiary rulings, *id.* at 1a-7a, and summarily rejected petitioner's additional claim (see Pet. C.A. Br. 42-46) that the district

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[1] Petitioner's trial counsel stated:

> We object to the fourth element of materiality delivered by the court in connection with the Section 1014 instruction. Materiality is not a word used in the indictment. It being a matter for the court, under Fifth Circuit law, we think it, the jury, should not properly be instructed on the matter at all.

10/25/93 Tr. 272.

court committed plain error in not requiring the jury to determine the materiality of the false statements. See Pet. App. 7a (stating without elaboration that "review of [petitioner's] remaining issues on appeal reveals no reversible error on the part of the district court").

ARGUMENT

Petitioner argues that materiality is an element of the offense described by 18 U.S.C. 1014 and that his conviction must be reversed because the district court did not instruct the jury that it must find that the false statements were material in order to convict. That contention lacks merit, both because materiality is not an element of Section 1014 and because, even if it were, any defect in the instructions in this case would not constitute plain error.

1. In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), this Court held that, where the materiality of a false statement is an element of an offense, the statement's materiality is to be determined by the jury, not by the court.[2] Materiality of the alleged false statement, however, is not an element of Section 1014. Section 1014 authorizes the conviction of whoever "knowingly makes any false statement," where that statement is made "for the purpose of influencing in any way the action" of covered financial institutions (including the federally insured bank involved here) on loans or other specified transactions. The lan-

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[2] To be material, a statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, 115 S. Ct. at 2313.

guage of Section 1014 does not require that the false statement also be material.

Because Congress defines the elements of an offense through the language of the statute, Section 1014 does not support the conclusion that materiality is an element of that offense. See *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the [legislature's] definition of the elements of the offense is usually dispositive."). Accordingly, as long as the false statement was made knowingly and for the purpose of influencing the bank's action on a loan, it is covered by the statutory proscription. *United States* v. *Cleary*, 565 F.2d 43, 46 (2d Cir. 1977) (materiality is not an element of Section 1014), cert. denied, 435 U.S. 915 (1978); see *United States* v. *Hoag*, 823 F.2d 1123, 1125-1126 (7th Cir. 1987) (materiality is not a requirement for conviction under a similarly worded statute, 18 U.S.C. 1010).

This Court reached a similar conclusion in *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938), in construing a statute that was a direct predecessor of Section 1014 and that contained identical pertinent language.[3] The

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[3] *Kay* involved a prosecution under former 12 U.S.C. 1467(a) (repealed 1948), which provided for punishment of "[w]hoever makes any statement, knowing it to be false, * * * for the purpose of influencing in any way the action of the Home Owners' Loan Corporation * * * upon any * * * loan." See 303 U.S. at 3 n.1.

Court held that the alleged immateriality of a false statement made for the purpose of influencing the recipient was not a defense. The Court rejected the argument that the conviction could be reversed if the false statements in issue "cannot endanger or directly influence any loan," holding that

> [i]t does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead.

303 U.S. at 5-6; see also *Williams* v. *United States*, 458 U.S. 279, 284 (1982) (listing elements of Section 1014; materiality not included).

It is true that most courts of appeals, including the court below, have listed materiality as an element of Section 1014—albeit an element that, before *Gaudin*, was generally held appropriate for judicial, not jury, resolution.[4] To the limited extent that those courts

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[4] See, *e.g.*, *United States* v. *Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995); *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); *United States* v. *Concemi*, 957 F.2d 942, 951 (1st Cir. 1992); *United States* v. *Haddock*, 956 F.2d 1534, 1549 (10th Cir.), cert. denied, 113 S. Ct. 88 (1992); *United States* v. *Rapp*, 871 F.2d 957, 964 (11th Cir.), cert. denied, 493 U.S. 890 (1989); *Theron* v. *United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987); *United States* v. *Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *United States* v. *Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982). But see *United States* v. *Cleary*, 565 F.2d at 46.

have explained the addition of materiality to the elements identified in the text of Section 1014, they have stated that such a limitation serves to exclude from prosecution trivial false statements. See, *e.g.*, *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992). That objective is already met, however, by Section 1014's intent element. To establish the Section 1014 offense, prosecutors must establish, *inter alia*, that the defendant made the false representation for the purpose of influencing the actions of a financial institution. That requirement necessarily restricts the scope of cases prosecutable under Section 1014. And because juries will generally determine the defendant's purpose in making a false statement by considering the nature of that statement and the context in which it was made, convictions under Section 1014 are unlikely except when the jury is satisfied that the statement was material to the bank's decision. For that reason, the court of appeals for the Seventh Circuit has noted that, if materiality were not an element of the offense, the materiality issue would nonetheless "come in by the back door," because "the less material the statement was, the less likely it was to have been made for the purpose of influencing the bank, rather than out of sheer forgetfulness, carelessness, or confusion." *Stani-*

We note that, following this Court's decision in *Gaudin*, a panel of the Eighth Circuit, in *United States* v. *Wells*, Nos. 93-3924WM et al., 1995 WL 494268 (Aug. 21, 1995), and a panel of the Ninth Circuit, in *United States* v. *Nash*, Nos. 91-50760 et al., 1995 WL 500653 (Aug. 24, 1995), reversed convictions under Section 1014 where the issue of materiality had not been sent to the jury. The government has sought extensions of time within which to seek en banc review of those two decisions.

forth, 971 F.2d at 1357-1358. Similarly, the Ninth Circuit has observed:

> Th[e] conflict over [whether materiality is an element of Section 1014] will usually be only of academic interest. * * * An individual is not likely to provide immaterial and unimportant information in the hope of influencing a bank's action.

United States v. *Thurnhuber*, 572 F.2d 1307, 1309 n.1 (1977). Because there is thus no persuasive justification for grafting a materiality requirement onto the text of Section 1014, petitioner was not entitled to have the issue of materiality submitted to the jury.

2. While the conflict among the courts of appeals as to whether materiality is an element of Section 1014 might warrant review in a proper case, this case does not supply an appropriate vehicle to resolve that question. Because petitioner failed to object to (and indeed endorsed) the district court's decision not to send the issue of materiality to the jury, the sole question presented would be whether that decision was plain error in light of the particular facts of this case. See *United States* v. *Olano*, 113 S. Ct. 1770, 1775-1779 (1993) (appellate court may consider claims of error not raised below only if error is "clear" and "obvious" under current law, and will not reverse unless the error affected substantial rights and unless failure to reverse would result in a miscarriage of justice that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings").

Petitioner fails to establish plain error. First, any error in the decision not to submit the issue of materiality to the jury in this case was not "clear" or

"obvious" under then-current law.[5] Nor was petitioner prejudiced by such error, both because the false representations he made to Sun Belt were patently material to its loan decisions, as the court of appeals found, see Pet. App. 5a-6a, and because, to convict, the jury necessarily concluded that petitioner made the false statements for the specific purpose of influencing the actions of Sun Belt on the loans. And, as we have discussed, it is difficult to imagine a jury finding such intent while at the same time regarding the false representations as incapable of influencing the bank's actions. Finally, even assuming clear error, petitioner's conviction did not amount to a "miscarriage of justice" warranting reversal, *Olano*, 113 S. Ct. at 1778-1779, given the jury's finding that petitioner sought to influence the lending decisions of Sun Belt through the false statements, and the findings by both the district court and the court of appeals that the statements were in fact material to those decisions.[6]

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[5] On the contrary, at the time of trial and even at the time of the court of appeals' decision (issued one month before this Court's decision in *Gaudin*), it was neither clear nor obvious that if materiality was an element of a false statement offense it should be decided by the jury. Rather, the weight of authority was that the materiality determination in false statement cases was a question for the court. See, *e.g.*, *United States* v. *Thompson*, 811 F.2d at 845 n.4.

[6] A panel of the Ninth Circuit, in *United States* v. *Nash*, *supra*, recently found it plain error to fail to submit a materiality question to the jury under Section 1014 in the circumstances of that case. As we have noted (note 4, *supra*), the government has sought an extension of time within which to file a petition for rehearing in *Nash*.

3. Finally, contrary to petitioner's assertion (Pet. 11-12), the decision below does not conflict with this Court's decision in *Gaudin*. *Gaudin* involved a prosecution under 18 U.S.C. 1001, and the government conceded that materiality was an element of that offense.[7] Moreover, this Court in *Gaudin* did not hold, even with respect to the Section 1001 offense at issue, that a failure to require the jury to determine materiality would necessarily constitute plain error requiring reversal. See 115 S. Ct. at 2322 (Rehnquist, C.J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] The issue whether materiality is an element of Section 1001 is distinct from the issue whether it is an element of Section 1014. Unlike Section 1014, one of the clauses of Section 1001 contains the term "material." Moreover, Section 1001 does not contain an intent element equivalent to the requirement of Section 1014 that the false representation be "for the purpose" of influencing the action of the decisionmaking body. See *United States* v. *Beer*, 518 F.2d 168, 171 (5th Cir. 1975) (requiring a showing of materiality under Section 1001, but distinguishing statutes that require proof that a false statement was " 'intended' to deceive").